

THE RESTORATION LAWYER

ADVOCATE FOR THE RESTORER

Dear Friends & Colleagues,



We have received many questions about a series of lawsuits filed by Thermapure, Inc. Below is the first in a series of reports on these cases and some of the legal issues presented. We have formed a common interest group called the Restoration Industry Defense Alliance (RIDA). The video clip explains more. I wish you the very best in all of your business endeavors.

Sincerely,

Edward H. Cross

THERMAPURE LITIGATION REPORT #1

New Lawsuit (CA)

On January 14, 2011, ThermaPure Inc. filed a lawsuit in California against Coast to Coast Water Damage Restoration, Inc. and the four other contractors listed on the Water Out web site as California service providers.

The **suit** alleges infringement of U.S. Patent No. 6,327,812, commonly referred to as "the '812 Patent." The suit alleges that ThermaPure is in the business of using heat to remediate homes and commercial buildings so that they are "free of mold, viruses, bacteria [and] insects." It also alleges that "ThermaPure's patented and proprietary processes are also used in construction dryout...." The '812 patent, entitled Method of Killing Organisms and Removal of Toxins in Enclosures, refers to the sanitizing of buildings. It does not claim that the process will dry buildings.

Objects of the '812 Patent

The stated objects of the process, according to the '812 patent, are to:

- Provide a non-toxic method for destroying organisms, including mold and insects;



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CONTRACTS

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For over a decade, Cross & Associates has been the nation's leading source for all types of contracts that relate to restoration, including work authorizations, construction contracts, mold disclaimers, as well as consulting agreements for environmental consultants and industrial hygienists. We offer custom-tailored contract packages for companies large and small.

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- Remove substantially all of the remains of the killed organisms from open areas in the structures;
- Filter gases leaving the enclosure;
- Destroy the organisms in a relatively short period; and
- Monitor the temperature level to assure that all areas reach the predetermined effective temperature.

The Water Out Lawsuit (TX)

On December 11, 2009, a U.S. District Court in Texas entered a **Partial Judgment** that Water Out Drying Corporation had induced the infringement of Claim 6 of the '812 patent. The jury did not find that the infringement was willful. The court found that Claim 6 was not invalid. However, there was a hung jury on the issue of monetary damages. The court ordered a new trial on the issue of damages, which has not occurred because Water Out filed Chapter 11.

The Temp-Air Lawsuit (IL)

In July 2010, ThermaPure filed a patent infringement **suit** in Illinois against Temp-Air, Inc., Servpro Industries, Inc., Disaster Kleenup International, Inc., Dri-Eaz Products, Inc., RxHeat, LLC, Cambridge Engineering, Inc. and Jon-Don, Inc.

ThermaPure has threatened other companies with patent infringement lawsuits if they refuse to sign a license agreement and pay substantial fees.

Potential Defenses

There are a variety of potential defenses available to a party that has been sued for patent infringement. One is "non-infringement."

Claim 6 of the '812 patent states that the process involves the real-time monitoring of the temperature from a group of *temperature-indicating probes* placed at predetermined locations within the structure. ThermaPure has stated that measuring the delivery of the heat is vital to the efficacy of the ThermaPure process because it assures uniformity of the heat and that the target temperatures have been achieved. A contractor who uses heat but does not engage in "real-time monitoring of the temperature with a group of temperature-indicating probes placed at predetermined locations" may argue that he or she has not infringed on ThermaPure's Claim 6.

Another defense to a patent infringement claim is that the patent is invalid. Challenges to the validity of the '812 patent are expected in the *Coast To Coast* and *Temp-Air* cases.

Nine months after the '812 patent was issued, its inventor filed an application for a new patent. The application stated that the methods used in the '812 patent "are not effective for...organisms, such as fungi, and toxic molds..." and that "many such fungi, molds and the like are a serious health hazard even when dead." This application is one of the documents that led to the issuance of another patent, "the **'491 patent**." The '491 patent is described as a "continuation-in-part" of the '812 patent.

The '491 patent states: "it is well-known that the heated air causes certain molds, fungi, etc. to sporulate, thus releasing spores into the structure and thus dispersing the harmful biological agents and possibly contaminating the structure to a greater degree than originally presented." It further states that "the use of positive pressure within the structure, as described [in the '812 patent] further increases the likelihood that biological contaminants will be dispersed throughout the structure" and that "it is not desirable to release such contagions into the air." A party sued for infringing on the '812 patent may argue that its own inventor has declared it ineffective and dangerous.

Strength in Numbers

As dedicated advocates for the restoration industry, our goal is to help the industry form a united front to address these and other legal issues. We have formed the **Restoration Industry Defense Alliance** (RIDA) and we invite you to join this effort. I look forward to your response.

Contact Ed



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Ed Cross hosts the first-ever Restoration Survivor Game Show, where contestants try to survive in a fast-paced jungle of tough customers, ruthless adjusters and fierce lawyers! Contestants compete for cash and prizes and will be critiqued and scored on their abilities to manage crises, negotiate bills, resolve conflicts and avoid litigation. Expect the unexpected!

The panel of celebrity judges for this spontaneous event includes RIA President Frank Headen, Rusty Amarante of BELFOR, Michael Pinto, Ph.D of Wonder Makers Environmental, Inc., and Paul Gross of Code Blue.

The "Restoration Sole Survivor" will win a prize package that includes a free set of customized Emergency Service Contracts prepared by Ed Cross, \$100 cash, a Restoration Survivor T-Shirt, and a spot on the panel of Celebrity Judges for the next Restoration Survivor Game Show!

Don't miss it!

Thursday, March 10, 2011: 1:00 p.m. – 2:30 p.m.
RIA 66th Annual Leadership Summit & Industry Expo
The Broadmoor, Colorado Springs, CO
For more information, call 443-878-1000 or email
events@restorationindustry.org. Register [here](#).



PROJECT MANAGEMENT WORKSHOP

Tim Hull, Violand Management
Edward H. Cross, The "Restoration Lawyer"

Learn to manage the chaos with Tim Hull and Ed Cross. This day-long course is a prerequisite for those pursuing their Water Loss Specialist (WLS) certification. Topics will include: Risk Management: A Cradle to Grave Overview; The Estimating & Scoping Process; Sales & Negotiation; Executing the Contract "Package;" Project Sequencing & Quality Control; and Legal Issues. Includes Case Studies and Interactive Group Exercises. May be attended for CEC credits. (For more information on RIA's WLS certification, visit www.restorationindustry.org.)

Friday, March 11, 2011: 7:45 a.m. – 3:00 p.m.
The Broadmoor, Colorado Springs, CO

| Disclaimer |

For more information, call 443-878-1000 or email
events@restorationindustry.org. Register [here](#).

About Cross & Associates

Cross & Associates offers litigation-prevention programs, problem-solving, contract drafting, collections and other legal representation to restoration contractors and environmental consultants nationwide.

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